CONFLICT OF LAWS—THE LAW CONTROLLING THE VALIDITY OF A MARRIED WOMAN'S CONTRACT.—The case of *Poole* v. *Perkins* (Va.), 101 S. E. 240, involves that troublesome question of whether the validity of a contract is to be ruled by the law of the place where made, or by that of the place of performance.

Mrs. Poole joined with her husband in the execution and delivery in Tennessee, where they were domiciled, of a promissory note to the order of Perkins, also domiciled in Tennessee, the note being payable in Virginia.

By the law of Tennessee the contracts of married women could not be enforced against her. By the law of Virginia she was bound by them.

It is a little difficult to determine whether the court, in concluding that the law of the place of performance should control, does so intending to announce the broad rule that what is the applicable law is to be determined by discovering what was the intention of the parties as to the law to be applied, or whether it does so intending to announce that the general rule is, that the validity of a contract is to be determined by applying the law of the place fixed for performance.

There is abundance of authority from courts having the highest regard of the profession, on both sides of these questions. The aim therefore will be, not so much to attempt a discussion of the cases *pro* and *con,* as to briefly present the question in the light of general principles.

It may well be said that the ultimate aim in the administration of civil justice, is to effectuate the intention of parties interested. So one essaying the solution of the question of what law should be applied in determining the validity of a contract, regard should doubtless be had for this principle.

In the case under discussion there is no evidence of what was the intention of the parties, aside from the facts that their contract was actually created, so far as it may be said to have been created at all, in Tennessee, and that it provided for payment in Virginia. Apparently, except for the fact that the state line between the two states ran through it, Bristol in Tennessee and Bristol in Virginia were one town. The note was made and delivered in the Tennessee part of the town while payment was provided for at the bank which happened to be in the Virginia part of the town; this being done as a mere matter of convenience, with no particular thought of what was the law of either state upon the capacity of a married woman to contract.

The question presented therefore, upon this theory of determining the applicable law, is one of whether the fact that the law of the place of performance, if applied, will establish validity, while the law of the place of making, if applied, will defeat all obligation, is in itself sufficent to require the conclusion, really as a matter of law, that the parties intended the application of the law which would give validity. Apart from the matter of judicial authority, to conclude that the parties intended validity rather than invalidity is not to draw a long bow. But it is not to be overlooked that it is one thing to say that, and quite another to say, that the note was made payable in Virginia because they appreciated that the law of that state upheld such contracts while the law of the state of Tennessee did not. In the opin-

ion of the writer it is doubtful whether any case can be found declaring the law to be, that the fact alone, that the law of one jurisdiction will enforce the contract while the law of the other will refuse enforcement, is sufficient to require the conclusion that the parties intended that the law of one rather than the other, should rule their act. Numberless cases justify the admissibility of this fact as evidentiary, but none so far as the writer has discovered, holds that it will outweigh the natural presumption that one expects his acts and conduct to be judged by the law of the place where he acts. The three cases in 91st, 93rd and 95th of Virginia reports, referred to in the opinion on this question, all involve the principle as applied in usury cases where a definite rule has grown up permitting the parties to contract for the rate obtaining in either jurisdiction.

Professor Beale points out, 23 HARV. LAW REV. 260, that to allow individuals to choose the law by which they will be bound is opposed to our system of jurisprudence. Law is an imposition by the state, using its legislative arm upon all persons within its jurisdiction, and such persons cannot choose not to be bound by it. They cannot *will* that they shall not be subject to its operation, nor that their conduct shall not be controlled by it. It is no answer to this argument to say that they do so choose when they go from one jurisdiction to another to consummate their act in order to secure the application of the law of that jurisdiction. In this sense every person doing any voluntary act may be said to choose the law determining the consequences of his act, because he might do it somewhere else. It is one thing to say that one may secure the application to his act of the law of a particular jurisdiction by going there and doing the act, and quite another to say that he may act in one jurisdiction, and by willing that the law of another shall control the consequences of his act, escape the consequences of the application of the local law.

"This intention," says Mr. Dicey in referring to the intention which sometimes influences the determination of the proper law, "is a quite different thing from the intention which, in the absence of fraud, or the like, must always exist that a contract may be valid; it is a different thing also from the intention that a contract made in fact under the law of one country, shall, as to its validity, be governed by the law of some other country. This is clearly a result that cannot be affected by the will of the partied." DICEY ON CONFLICT OF LAWS, 555.

Mr. Wharton, in speaking to exactly the same question as that involved in the case under discussion says, "The capacity of parties to contract is one of those matters which relates to the question of whether, in a legal sense, any contract has been brought into existence, and its governing law should be determined by a fixed rule, not dependent upon the will of the parties; and as a matter of fact, while the courts have not always agreed upon the rule, they have seldom referred the ultimate question of the governing law in this respect, to the intention of the parties." WHARTON ON CONFLICT OF LAWS, 904.

Mr. Minor, in his "CONFLICT OF LAWS," uses this language, "The design

or purpose of the parties to enter into a valid contract, standing alone, can never suffice to validate a contract prohibited by the law, nor to invalidate a contract not legally prohibited. * * * The question therefore, where the validity of the contract is under investigation, is not what law do the parties intend shall govern a particular element, but what law shall actually govern it." MINOR, CONFLICT OF LAWS, p. 401. Mr. Minor then proceeds to show that a contract may fail because the things done, where done, do not create a contract, or because to perform the contract in the place provided for performance is not permitted by the law of that place, or because the consideration for the contract involves the doing of something in a jurisdiction where, to do the thing is prohibited. In other words the question may relate to the matter of creation of the contract, or to its performance or to its consideration, and the controlling law is to be determined by determination of the situs of that element of the contract involved.

It is an easy conclusion that the matter of "capacity" of a party to make a particular contract relates itself, not to the performance, nor to the consideration, but to the creation of the contract. Without capacity the party cannot create.

The fact that the act in performance of the contract is ruled by the law of the place of the act in performance, and the act which furnishes the consideration for the contract, is ruled by the law of the place of that act, is but a supporting argument for the contention that the act of making shall be ruled by the law of the place of the act of creation.

The court in its opinion in the case being discussed, gives countenance to the doctrine that "where the contract is made in one place and is to be performed in another, not only may the law of the latter be properly called the (law of) the locus contractus, but that it ought in all respects, except as to the formalities and solemnities and modes of execution, to be deemed the rule to govern such cases." The serious objection to such a conclusion, involving as it does the proposition that if the place where the contract is actually executed differs from the place of performance, then the place of making is the place of performance, is its wide departure from fact. It suggests the homely adage that "one can't make a calf's tail a leg by calling it one". No emphasis can be put on words used, sufficient, or so placed, as to make Virginia the place of making of the contract, when every act having to do with its coming into existence is done in Tennessee, all the parties at the time were there and there domiciled. The universally recognized rule in the law of contracts is that the contract is made in that place where the last step is taken to make it a binding obligation, the contract in question was fully created in so far as it had any existence, long before there was anything having reference to it done, or to be done, in Virginia, and no step at any time was taken in Virginia having anything to do with its creation. If the contract was ever born, no more misleading statement could be made than to say that its birth-place was Virginia.

But it is said, that apart from the contention that intent of parties controls, and apart from the theory that the place of making is the place of per-

formance regardless of the place where the contract actually comes into being, there is still a hard and fast rule that where the place of making is different from the place of performance, the contract is ruled, as to its validity, by the law of the place of performance, and authorities sufficient in numbers to satisfy of the existence of almost any other rule of law can be found in support of the proposition. Certainly as respectable showing of authority can be found in opposition. Whence this confusion? It seems best accounted for by recognizing that there has been a failure to analyze the contract and note that its different elements, the making, the performance and the consideration, may each have its own situs differing from each of the others, and therefore each have its own law controlling it. Some court has rightly enough decided some time that a contract was void because the law of the place of its performance made it void, and some other court has adopted the decision as establishing the doctrine that the validity of a contract is ruled by the law of the place fixed for its performance. If the first case involved the question of the lawfulness of doing the act required for performance it might well conclude that the place where the act is to be done should furnish the answering rule. Whereas it would be absurd to contend that such a decision should furnish the rule for a case where the question of validity had no relation to the place or matter of performance.

Excellent discussions of the questions involved in the case examined, may be found in the following authorities; many of which are referred to in the opinion of the court:

Campbell v. *Crampton,* 2 Fed. 414; *Union National Bank* v. *Chapman,* 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. Rep. 614; *Burr* v. *Beckler,* 264 Ill. 230, L. R. A. 1916A, 1049. The reports of *Bank* v. *Chapman* and *Burr* v. *Beckler* in L. R. A. are accompanied with excellent notes. To these should be added the case of *Mayer* v. *Roche,* 77 N. J. Law, 681, 26 L. R. A. (N. S.) 763, and note, and the text citations given *supra.* V. H. L.

THE LEGAL STATUS OF ABSTRACT BOOKS—LITERARY PROPERTY, IMPLIED CONTRACT OF SECRECY, UNFAIR TRADE.—A recent case before the Supreme Court of Washington raises some novel and interesting questions. A company engaged in the abstract business mortgaged its "records, books, plats." After suit was commenced to foreclose the mortgage, the mortgagor, who remained in possession, made photographic copies of the records and sold them to the defendant who had notice of the mortgage of the originals. The foreclosure resulted in a sale of the property, described as in the mortgage, to the plaintiff. Whether plaintiff knew at this time of the existence of the copies does not appear. Plaintiff is using the original records in the conduct of an abstract business and defendant is using the copies in competition with him. The action was brought to recover the copies. The court holds that it cannot be maintained because, assuming that the mortgage included the copies, the copies were not embraced in the sheriff's sale. It asserts, *obiter,* that the mortgagee might have enjoined the making of the copies, and it raises, but